2003

University of Utah Hospital and University of Utah v. American Casualty Company of Reading, PA: Brief of Appellant

Utah Court of Appeals

David G. Williams; Terence L. Rooney; Julianne P. Blanch; Snow, Christensen & Martineau; Thomas N. Crosther; Brett A. Gardner; Crowther & Gardner, P.C.; Attorneys for Appellants.
Jaryl Rencher; Epperson & Rencher, PC; Alec M Barinholtz; Jennifer Mathis; Ross, Dixon; Attorneys for Appellee .

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

UNIVERSITY OF UTAH HOSPITAL AND UNIVERSITY OF UTAH, Appellants, vs. AMERICAN CASUALTY COMPANY OF READING, PA, Appellee.	**BRIEF OF APPELLANT ST. PAUL FIRE AND MARINE INSURANCE COMPANY** **ON APPEAL FROM THE THIRD DISTRICT COURT OF THE STATE OF UTAH, SALT LAKE DEPARTMENT** (Honorable Glenn K. Iwasaki) Case No. 20030070-CA
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota Corporation Appellant, vs. AMERICAN CASUALTY COMPANY OF READING, PA, and TROY ALAN BROKA, Appellees.	

Jaryl Rencher
EPPERSON & RENCHER
Crandall Building
10 West 100 South, #500
Salt Lake City, Utah 84101

Jennifer Mathis
Alec Berinhotlz
ROSS DICKSON & BELL
5 Park Plaza, Suite 1200
Irvin, California 92614-2700

Attorneys for Appellee American Casualty Company of Reading PA

Thomas N. Crowther
Bret A. Gardner
CROWTHER & GARDNER, P.C.
1121 East 3900 South, Suite 115
Salt Lake City, Utah 84124

Attorneys for Appellant St Paul Fire and Marine Insurance Company

LIST OF ALL PARTIES

1. University of Utah Hospital and University of Utah - Appellants
2. St. Paul Fire and Marine Insurance Company- Appellant
3. American Casualty Company of Reading PA - Appellee
4. Troy Alan Broka - Named Appellee, but not served with Summons and Amended Complaint by Appellant St. Paul.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

JURISDICTIONAL STATEMENT

Jurisdiction to decide this appeal is conferred upon the Court of Appeals by Sections 78-2-2(4) and 78-2a-3(2)(j), *Utah Code Ann.*, since the Supreme Court has transferred to the Court of Appeals this matter over which the Supreme Court had original appellate jurisdiction, and Rule 3(a) of the *Utah Rules of Appellate Procedure*.

STATEMENT OF ISSUES

The issues asserted by Appellant St. Paul Fire & Marine Insurance Company ("St. Paul") on appeal are as follows:

1. Whether a claim was made that would trigger an obligation or liability of Appellee American Casualty Company of Reading PA ("American") under the insurance policy it issued to Defendant Troy Alan Broka ("Broka'). The standard of appellate review is one of correctness. *Arnold Industries v. Love*, 63 P.3d 721, 722 (Utah 2002). (See St. Paul's Memorandum in Opposition to American's Motion for Summary Judgment dated March 25, 2002, hereinafter, "St. Paul's Memorandum," (Record at 374).

2. Whether St. Paul is precluded from pursuing a subrogation claim against American. The standard of appellate review is one of correctness. See Id. at 722.

3. Whether St. Paul is precluded from pursing a claim of equitable contribution against American. The standard of appellate review is one of correctness. (See Id. at 722.

4. Whether the Third District Court erred in ruling that because no claim was made directly against Broka, St. Paul has no subrogation or equitable contribution claims

against American. The standard of appellate review is one of correctness. See Id. at 722.

STANDARD OF REVIEW

The applicable standard of appellate review on appeal from a summary judgment ruling in the state district court is a review for correctness with no deference given to the district court's legal conclusions. Id. at 722.

Furthermore, in reviewing a grant of summary judgment, the facts and all reasonable inferences drawn therefrom are to be viewed in the light most favorable to the nonmoving party. Id. at 722.

STATUTORY PROVISIONS

By ruling on less than all issues and not reaching issues involving statutory provisions, there are no statutory provisions that are determinative of this appeal.

STATEMENT OF CASE

A. Background Information

Broka was employed by Appellant University of Utah Hospital ("Hospital") in April, 1997. Broka provided nursing care to a Hospital patient, Abel Hepworth ("Hepworth") in April, 1997. In the course of providing such care to Hepworth, Broka allegedly misread a physician's order for infusing IV liquids and infused Hepworth with an excessive amount of fluids causing Hepworth 's death on April 14, 1997. Shortly after Hepworth 's death, his wife informed the Hospital of her intention, on behalf of herself and her minor children, to commence legal action to recover for Hepworth 's death.

American provided and issued professional liability insurance to Broka. The Hospital contacted American regarding the claim asserted by Mrs. Hepworth and invited American's participation in settlement negotiations and tendered defense and indemnification of Broka to American. American refused to provide coverage to Broka or to participate in settlement negotiations with Mrs. Hepworth.

In settlement negotiations with Mrs. Hepworth, the Hospital settled her claim for $1,323,523.00. The Hospital self-insured up to a retention of $1,000,000.00 and paid that amount to Mrs. Hepworth in connection with such settlement. Appellant St. Paul provided the Hospital with excess liability insurance coverage above $1,000,000.00 and paid the remaining $323,523.00 of the settlement to Mrs. Hepworth.

Upon claims of subrogation and contribution, St. Paul seeks reimbursement from American of the amount paid by St. Paul ($323,523.00) in connection with the Hepworth settlement that should have been paid by American in connection with its liability policy issued to Broka.

B. The Parties' Cross-Motions for Summary Judgment.

On February 26, 2002, the Hospital moved for summary judgment against American. The Hospital's Motion asserted that the insurance policy issued by American to Broka, employed by the Hospital, was the primary insurance policy covering Broka for negligence and wrongful death claims brought by third parties. The Hospital sought a ruling from the District Court that American was primarily responsible to cover Broka and

that American must reimburse the Hospital for monies expended to settle the claim arising out of care rendered by Broka.

On March 1, 2002, American also moved for summary judgment against the Hospital and St. Paul. American's Motion asserted that Broka was employed by a governmental entity and was acting in the course and scope of his employment in providing nursing care to Hepworth, and Broka was afforded immunity from incurring any personal liability for an underlying wrongful death claim. American relied for support of this argument on Section 63-30-1, *Utah Code Ann.,* the Utah Governmental Immunity Act. Accordingly, American asserted that Broka was statutorily protected from having to contribute to any settlement the Hospital made for claims within the scope of Broka 's employment.

Furthermore, American argued that because Broka would not have been legally obligated to pay any amounts in connection with a settlement under any circumstance present in the case, coverage under American's policy on Broka never triggered. American contends that its policy only provides coverage for amounts that Broka is legally obligated to pay. American argues that Broka was never legally obligated to pay, and the Hospital and St. Paul are therefore not entitled to subrogation and/or equitable contribution from American.

St. Paul joined in the Hospital's Memorandum Opposing American's Motion for Summary Judgment. In addition, St. Paul argued that its asserted claim against American

for equitable contribution precluded American being awarded summary judgment.

C. The Third District State Court's Decision.

On September 6, 2002, the Honorable Glenn K. Iwasaki of the Third District Court entertained oral argument with respect to the parties' motions. During the course of such oral argument, St. Paul raised the issue of application in this matter of Article I, Section 11 of the Utah Constitution and argued that such provision renders unconstitutional sections of the Utah Governmental Immunity Act relied upon by American in support of its Motion. All parties were allowed the opportunity to fully brief this issue following the hearing.

On October 7, 2002, the Third District Court issued its Memorandum Decision, granting American's Motion for Summary Judgment. The University's Motion for Summary Judgment was denied. The District Court concluded that the University essentially conceded that Mrs. Hepworth made no "claim" within the meaning of the American policy against Broka. The District Court went on to hold that this was critical inasmuch as the American's policy was triggered only by a "claim" or an insured's legal obligation to pay some amount. Broka never had any claim made directly against him and never became legally obligated to pay anything to Ms. Hepworth in connection with the Hospital and St. Paul settlement of the Hospital's liability. Consequently, the Court held that none of American's obligations under the policy issued to Broka ever matured.

With respect to St. Paul, the Court held that there can be no claim for contribution among insurers unless one insurer was equally obligated to provided coverage to the same

insurer for the same risk, yet failed to do so. The District Court went on to hold that the obligations triggered by the Hepworth family's demands were those of the Hospital and its insurer, St. Paul, for amounts in excess of the Hospital's retained limit. The Hepworths made no demand that would have triggered the American Policy.

In light of the foregoing ruling, the District Court did not reach the issue of the Utah Government Immunity Act, nor the constitutional issues surrounding the Act.

The Hospital and St. Paul now appeal the District Court's Order, to challenge the ruling of the District Court for correctness.

STATEMENT OF FACTS

On April 10, 1997, Hepworth was admitted to the Hospital for surgical repair of an aneurysm in a cerebral artery. See Hospital's Memorandum in Support of Motion for Summary Judgment, Statement of Undisputed Facts, ¶ no. 3 (hereinafter, "Hospital's Memorandum"), Record at 94. Broka was employed by the Hospital as a travel nurse and provided nursing care to Hepworth. (Hospital's Memorandum, ¶ no. 2, Record at 94).

In providing care to Hepworth, Broka negligently misread a physician's order for the infusion of IV fluids, and infused Hepworth with an excessive amount of fluids at 500cc per hour instead of 100cc per hour ordered by Hepworth's treating physician. (Hospital's Memorandum, ¶ no. 3, Record at 94). Consequently, on April 14, 1997, Hepworth died as a result of fluid overload from Appellee Broka's incorrect administration of fluids. (Hospital's Memorandum, ¶ no. 3, Record at 94).

American's professional liability insurance to Broka was in effect at all material times. (Hospital's Memorandum, ¶ no. 5, Record at 95). Broka's professional liability coverage with American provided limited liability, in the event of a claim arising from the rendering of professional nursing services by Broka, in the amounts of $1,000,000.00 for each medical incident and $3,000,000.00 aggregate. (Hospital 's Memorandum, ¶ no. 5, Record at 95).

Broka's American policy provided professional liability coverage to him for, among other things, injury or damage caused by a medical incident arising out of care provided by Broka. (Hospital's Memorandum, ¶ no. 5, Record at 95).

The Hospital self-insured its employees with professional liability insurance with [1]coverage up to $1,000,000.00 per occurrence. (Hospital 's Memorandum, ¶ no. 8, Record at 96). St. Paul provided the Hospital with excess liability insurance coverage above the Hospital $1,000,000.00 per occurrence self-retention amount. (See St. Paul 's Amended Complaint, ¶ no. 8, Record at___ [1]). Broka 's professional liability insurance with American is an excess insurance policy, or, in the alternative, is an escape insurance policy. St. Paul provided to the Hospital, excess liability insurance coverage. (St. Paul 's Amended Complaint, ¶ no. 10[1]). The Hospital provided primary liability insurance coverage to

---

[1]For some reason St. Paul's Complaint and Amended Complaint were not included in the record prepared by the clerk in the District Court 's office. Therefore, a page citation to the record cannot be included. The clerk 's office has been notified of this oversight, and a copy of St. Paul 's Amended Complaint is included in the Addendum to this brief.

Broka. (St. Paul's Amended Complaint, ¶ no. 10[1]) St. Paul and American provided secondary liability insurance coverage to Broka. (St. Paul's Amended Complaint, ¶ nos. 8 & 10[1])

Following the death of Hepworth, the Hospital was informed by his wife, Susan Hepworth, acting individually and on behalf of the Hepworth 's two minor children, Alex Hepworth and Ammon Hepworth, that she intended to commence a lawsuit against the Hospital and Broka based on the care provided to her husband by Broka. (Hospital 's Memorandum, ¶ no. 4, Record at 94). Prior to commencing the lawsuit, Mrs. Hepworth initiated settlement negotiations with the Hospital. (Hospital 's Memorandum, ¶ no. 4, Record at 94).

On or about June 11, 1997, counsel for the Hospital informed American of the facts involving Broka and invited American 's participation in the settlement negotiations with Mrs. Hepworth. (Hospital's Memorandum, ¶ no. 9, Record at 96 and 152). By letter dated July 17, 1997, American declined to participate in settlement negotiations with Mrs. Hepworth. (Hospital's Memorandum, ¶ no. 11, Record at 97).

Because Broka was an agent of the Hospital, and because his negligence caused Mr. Hepworth's death, the Hepworth family's claims were subsequently settled by the Hospital and St. Paul. (St. Paul's Amended Complaint, ¶ no. 19[1]). As part of such settlement, the Hospital paid to the Hepworths $1,000,000.00, and St. Paul paid to the Hepworths $325,523. (St. Paul's Amended Complaint, ¶ no. 20[1]).

SUMMARY OF ARGUMENT

American's policy for excess insurance on Broka was triggered by a claim made directly by the Hospital to American. American had a duty to provide coverage and participate in the Hepworth settlement with the Hospital and St. Paul. Sound public policy and a great weight of legal authority suggest that an insurer may receive notice of a claim from sources other than the insured in order to trigger coverage. In this case, such notice came from the primary insurer-Hospital to an excess insurer-American. Notice of a claim from a source other than the insured is proper where notice of a claim involves a demand for money against the insured involving a medical incident under the terms of the insurer 's policy, timely notice is given by a third party source to the insurer, notice of the claim does not prejudice the insurer, and the notice allows the insurer adequate time to investigate the claim to protect itself. Thus, the District Court's decision is incorrect and should be overturned.

St. Paul's right to equitable contribution is not a matter of contract, but stems for equitable principles designed to accomplish ultimate justice in the bearing of a specific burden where two insurers provide excess coverage to the same insured for the same risk. The right of contribution belongs to St. Paul individually. It is not based on any right of subrogation to the rights of Broka, and it is not equivalent to "standing in the shoes" of Broka. Therefore, St. Paul is entitled to equitable contribution from American in an amount to be determined at the trial court level.

ARGUMENT

I. AMERICAN'S POLICY FOR EXCESS INSURANCE WAS TRIGGERED BY A CLAIM MADE DIRECTLY BY THE HOSPITAL TO AMERICAN.

American's policy for excess insurance coverage on Broka was triggered by notice of a claim which American first received from the Hospital. It should make no difference that a demand was not first made directly on Broka. Under the American policy, a claim is defined as follows:

> IV ADDITIONAL DEFINITIONS
>
> "Claim" means the receipt by **you** [insured] of a demand for money or services naming **you** and alleging a **medical incident**.

(Record at 133 emphasis in original, brackets added).

Accordingly, the insured is generally obligated to promptly inform the insurer when a demand for money is made against the insurer involving a medical incident. Further, under the American policy, the insured is obligated to report a claim once the insured is aware of, or reasonably believes that, there may be a claim asserted against the insured. A "claim," as above-defined by the American policy, means a demand for money alleging a medical incident. The American policy does not define a claim as being triggered by the insured's legal obligation to pay some amount to a person injured or damaged by the insured in a medical incident. In other words, the insured is not obligated to give notice of a claim to American only when he becomes legally obligated to pay such claim. Prompt notice of a claim should be given once **demand** for money involving a medical incident is

made. The American policy does not specify or limit from whom American must receive such a demand. Often such a demand comes from the insured, but not always, and not necessarily so.

An insurance company may learn of a claim or a potential claim against the insured from a source other than the insured. In states that require a showing of prejudice before coverage can be denied because of a breach of the notice provision of an insurance policy, such third party notice should be deemed to satisfy the insured's notice requirement. See generally *Hanson v. Barmore*, 779 P.2d 1360, 1362-63 (Colo. Ct. App. 1989); *Standard Oil Co. v. Hawaiian Ins. & Guar. Co.*, 654 P.2d 1345, 1348 n4 (Haw. 1982) (notice received from other insured under policy was sufficient); *McLaughlin v. Attorney's Title Guar. Fund,* 378 N.E.2d 355, 360 (Ill.1978) ("where the insurance company has actual notice of the loss or receives the necessary information from some other source, there is no prejudice to the insurer from the failure of the insured to give notice of the claim "); *Bibb v. Dairyland Ins. Co.*, 205 N.W.2d 495, 496 (MI.1973) (notice received from insured party 's attorney was sufficient); *Great Am. Ins. v. CG Tate Constr. Co.*, 265 S.E.2d 467, 472 (N.C.1980) (it does not matter from what source the insurance company eventually receives notice); *Lusch v. Aetna Cas. Sur. Co.*, 538 P.2d 902, 904 (Or. 1975) (insurer is not prejudice by insured's failure to give timely notice if "a third party notifies the insurer in time for the insurer to adequately investigate the claim and protect itself"). This same principle should apply by analogy to this case and the demand made by the Hospital upon

American even though a demand was never made directly on nurse Broka.

Prompt notice of a claim should be given to the insurer in order that the insurer may have an opportunity to acquire, through adequate investigation, full information about the circumstances of a claim so that the insurer can protect itself. It should make no difference whether notice of the claim is made directly upon the insured by demand letter, initiation of formal legal proceedings against the insured or the like, or whether notice of the claim is made directly upon the insurer from some source other than the insured. This is especially true in this case where St. Paul raises a claim of equitable contribution against American and does not stand in the shoes of Broka in order to seek such contribution from American.

In this case, American received prompt notice of the claim against Broka from the Hospital within two months following Hepworth 's death. American had every opportunity to investigate and acquire full information about the circumstances of the claim. American simply chose not to participate in settlement following receipt of notice of the claim from the Hospital. American was not prejudiced simply because it received notice of the claim from the Hospital and not Broka.

Consequently, it makes no reasonable sense to require that a demand for money alleging a medical incident must first be sent by the injured party to the insured, who is then obligated to pass notice of the claim on to the insurer, rather than the injured party sending notice of the claim directly to the insurer. Such a requirement suggests that a person injured or damaged by a medical incident must possess a foreknowledge of the

contract language of the insured's insurance policy which instructs that a demand must first be made directly upon the insured. A person injured or damaged by an insured rarely, if ever, has access to the insured's insurance policy in order for the person to determine how and to whom such a demand should be made. It is unreasonable, contrary to sound public policy, and against the greater weight of legal authority that an insurer such as American be alleviated from its obligation to pay out on a claim for a related medical incident involving one of its insureds where the insurer has collected a premium from its insured, insured a risk, received prompt notice of the claim, and has been allowed the opportunity to thoroughly investigate that claim, simply because notice of the claim was made by the Hospital to American rather than to Broka himself.

Timely notice of the claim was given to American. American had every opportunity to investigate the claim in order to protect itself just as if the claim had been given by Broka directly to American. American was not prejudiced by notice from a third party other than Broka. Consequently, American had a duty to provide coverage and participate in the Hepworth settlement. The District Court's decision is incorrect and should be overturned.

II. CLAIM FOR EQUITABLE CONTRIBUTION.

St. Paul insured the Hospital and all of its employees, including nurse Broka, with excess liability insurance coverage above the Hospital's one million dollars per occurrence self-retention amount. St. Paul's limit of liability was five million dollars aggregate.

American also insured Broka with a one million dollar limit of liability per each "medical incident." American's limit of liability is three million dollars aggregate. Both St. Paul and American insured the same insured, Broka, for the same risk. It makes no difference that St. Paul also insured other employees of the Hospital under its excess policy for similar risks.

Because both St. Paul and American insured Broka for the same risk, St. Paul is entitled to equitable contribution from American for its portion of the loss paid by St. Paul to the Hepworths. *See Fireman's Fund Ins. Co. v. Md. Casualty Co.,* 65 Cal. App. 4th 1279 (1998).

St. Paul's right to equitable contribution is not a matter of contract, but stems from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden where two insurers provide excess coverage to the same insured for the same risk. *See Id.* at 1295.

The right of equitable contribution belongs to St. Paul individually. It is not based on any right of subrogation to the rights of Broka, and it is **not** equivalent to "standing in the shoes" of Broka. Such right to contribution is therefore not limited to traditional subrogation defenses or to any argument that Broka, having himself paid no claim, has no claim against American. The California Court of Appeals in *Fireman's Fund Ins. Co.* explained the following with respect to the doctrine of equitable contribution:

> **. . . [T]he reciprocal contribution rights of co-insurers who insure the same risk are based on the**

> **equitable principal that the burden of indemnifying or defending the insured with whom each has independently contracted should be borne by all of the insurance carriers together, with the loss equitably distributed among those who share liability for it in direct ratio to the proportion each insurer's coverage bears to the total coverage provided by all of the insurance policies.**

Id. (Emphasis added).

St. Paul's claim for equitable contribution is not precluded by any argument that American stands in the shoes of Broka, or that Broka has no claim against American, because St. Paul is not required to stand in the shoes of Broka or the Hospital with respect to Broka's defenses and thus become subject to the defenses. Neither does the fact that *Gulf Ins. Co. v. Horace Mann Ins. Co.* 567 P.2d 158 (Utah 1977), relied upon by American, places American in Broka's shoes preclude St. Paul's claim for equitable contribution against American. The right of equitable contribution is not derivative and is not dependent upon any rights of other parties, including Broka and the Hospital. St. Paul's contribution claim is not a claim based upon subrogation to another person 's rights, but is a claim arising directly in St. Paul by reason of it having paid a claim for which American also had responsibility.

The *Fireman's Fund* court stated:

> Equitable contribution is entirely different [from subrogation]. It is the right to recover, not from the party primarily liable for the loss, but from a co-obligor who shares such liability with the party seeking contribution. . . .Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has **independent standing** to

> assert a cause of action against its co-insurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was equally and concurrently owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. **The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others.**

Fireman's Fund, supra 1293. (Emphasis added).

"Unlike subrogation, the right to equitable contribution exists independently of the rights of the insured." *Id. at 1295.* St. Paul's right to contribution from American stems from the fact that St. Paul insured and paid out on an insured and on a risk that American also insured and upon St. Paul's independent standing under such circumstances to recover contribution directly from American. Therefore, St. Paul is entitled to equitable contribution from American in the amount of one-half or $162,761.50 of the $325,523.00 paid out by St. Paul on the Hepworth settlement.

CONCLUSION

St. Paul is entitled to and requests a ruling of this Court that the District Court's decision is incorrect and that American's Motion for Summary Judgment should be denied.

Dated June 2, 2003

CROWTHER & GARDNER, P.C.
Counsel for Appellant St. Paul Fire &
Marine Insurance Company.

By: _____
Thomas N. Crowther

By: _____
Bret A. Gardner

CERTIFICATE OF SERVICE

Two copies of foregoing Brief of Appellant St. Paul Fire and Marine Insurance Company were served upon the following counsel, via first class United States Mail, postage prepaid, at the addresses indicated below, this 2 day of June, 2003:

Jaryl Rencher
EPPERSON & RENCHER
Crandall Building
10 West 100 South, #500
Salt Lake City, Utah 84101

Jennifer Mathis
Alec Berinhotlz
ROSS, DICKSON & BELL
5 Park Plaza, Suite 1200
Irvin, CA 92614-2700

Terence L. Rooney
Julianne P. Blanch
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Suite 1100
Salt Lake City, UT 84145-5000

ADDENDUM

Attached hereto are date-stamped copies of the Final Order and Judgment, the District Court's Memorandum Decision upon which such Final Order and Judgment are based, and St. Paul's Amended Complaint.

Jaryl L. Rencher #4903
EPPERSON & RENCHER, PC
10 West 100 South, #500
Salt Lake City, Utah 84101
Telephone: (801) 983-9800

Alec Barinholtz (*Pro Hac Vice)*
Jennifer Mathis (*Pro Hac Vice)*
ROSS, DIXON & BELL, L.L.P.
5 Park Plaza, Suite 1200
Irvine, California 92614-8529
Telephone: (949) 622-2700

Attorneys for Defendant American Casualty Company of Reading, PA

THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UNIVERSITY OF UTAH HOSPITAL and UNIVERSITY OF UTAH, Plaintiffs, v. AMERICAN CASUALTY COMPANY OF READING, PA	**ORDER AND JUDGMENT ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT** 9809131590 Case No. ~~9809131590~~ Judge Glenn K. Iwasaki
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota Corporation, Plaintiff, v. AMERICAN CASUALTY COMPANY OF READING, PA, and TROY ALAN BROKA, Defendants.	

Plaintiffs University of Utah and University of Utah Hospital's Motion for Summary Judgment (in which plaintiff St. Paul Fire and Marine Insurance Company joined), defendant American Casualty Company of Reading PA's Motion for Summary Judgment, and American Casualty's Motion to Strike the Affidavit of Lynn Faldmo came on for hearing before the Court on September 6, 2002. Following the hearing, St. Paul and American Casualty submitted supplemental briefing.

Having heard oral argument and having read and considered all papers and supporting documents submitted in connection with the parties' motions, the Court issued a memorandum decision dated and signed October 7, 2002, wherein the Court granted American Casualty's Motion for Summary Judgment, denied the University's Motion for Summary Judgment and denied American Casualty's Motion to Strike.

For the reasons set forth in the Court's October 7, 2002 memorandum decision, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT JUDGMENT BE ENTERED FORTHWITH in favor of defendant American Casualty Company of Reading, PA and against plaintiffs the University of Utah and University Hospital and St. Paul Fire and Marine Insurance Company and that plaintiffs' lawsuit against American Casualty be dismissed with prejudice.

DATED this 30 day of Dec., 2002.

BY THE COURT:

The Honorable Glenn K. Iwasaki
Third Judicial District Court Judge

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UNIVERSITY OF UTAH HOSPITAL and UNIVERSITY OF UTAH Plaintiffs, vs. CONTINENTAL CASUALTY dba CNA INSURANCE COMPANIES, an Illinois corporation, Defendant.	MEMORANDUM DECISION Case No.980913150 Hon. GLENN K. IWASAKI Court Clerk: Janet Banks October 4, 2002
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota corporation, Plaintiff, vs. AMERICAN CASUALTY COMPANY OF READING, PA and TROY ALAN BROKA, Defendants.	

The above-entitled matter comes before the Court pursuant to Cross Motions for Summary Judgment and American Casualty Company of Reading, PA's Motion to Strike Portions of the Affidavit of Lynn Faldmo. The Court heard oral argument with respect to the motions on September 6, 2002. Following the hearing, the Court granted the parties time for additional briefing.

The Court having received the additional briefing and considered the motions, memoranda, exhibits attached thereto and for the good cause shown hereby enters the following ruling.

Addressing first the Motion to Strike, after reviewing the Affidavit and Supplemental Affidavit of Ms. Faldmo, the Court is persuaded it is subject to appropriate exceptions to the hearsay rule and, further, any deficiencies with regard to personal knowledge have been cured. Accordingly, the motion is denied.

Turning next to the Cross Motions for Summary Judgment, the plaintiffs, University of Utah and University of Utah Hospital (collectively "the University") settled a claim brought by a widow, Susan Hepworth, whose husband died, allegedly due to a nurse's negligence. The University secured an agreement from Mrs. Hepworth releasing it and its agents and employees from all liability connected with the patient's death and paid $1 million of its own money to help settle the lawsuit.[1]

With this Complaint, the University seeks subrogation and contribution. Specifically, the University seeks a ruling form this Court that American Casualty Company of Reading, PA ("American") is the primary insurance policy covering the nurse,

---

[1]The University's lawsuit was consolidated with a lawsuit brought by St. Paul Fire & Marine Insurance Company against American. St. Paul also seeks reimbursement for monies it contributed to the settlement.

Troy Alan Broka ("Nurse Broka"), and that American is, therefore, primarily responsible for covering Nurse Broka, and, consequently, must reimburse the University for monies paid toward the settlement.[2]

With their motion for summary judgment, the University asks this Court to Rule as a matter of law that American is Nurse Broka's primary insurance carrier.[3] Specifically, notes the University, American asserts the other insurance clause in the policy issued to Nurse Broka makes the policy excess to the University's self-insurance program.[4] This is nonsensical, asserts the University, as Nurse Broka did not have his own self-insurance program and although the University has a self-insurance program, the clause does not state that it extends to "self-insurance

---

[2]The University is self-insured for professional liability claims up to $1 million-when there is not insurance available to cover the particular claim.

[3]A determination of amount is not sought.

[4]Section VII OTHER INSURANCE provides:

> If other valid and collectible insurance is available to you for a claim we cover under this policy, our obligations are limited as follows:
>
> Excess Insurance
> This insurance is excess over any other insurance, self-insurance, self-insured retention or similar programs, whether primary, excess, contingent or on any other basis.

programs of others." Indeed, argues the University, it never reviewed the policy and never agreed to act as Nurse Broka's primary liability insurance.

Next, the University asserts American's interpretation of "other insurance" is overboard and renders the policy worthless as hospitals have risk allocation systems in place, whether through self-insurance programs or insurance policies and under American's view of the clause, it would never need to pay a claim against one of its insureds because the hospital that employed the nurse will always be self-insured or have its own insurance coverage.

Moreover, it is the University's position that even if the "other insurance" clause is interpreted as American urges, the clause runs counter to public policy requiring an insurer to cover an insured when it bargained for the risk and received premium payments. Finally, contends the University, Utah courts will not enforce an insurance clause that serves to deprive the insured of coverage when the clause could not easily be found by the insured.

American opposes the motion and brings its own motion for summary judgment arguing the Utah Governmental Immunity Act and controlling Utah case law, together, preclude Nurse Broka from incurring any personal liability for the underlying wrongful death matter and further prohibit the University or its insurer from seeking indemnification from the University's employees or their

employees' insurers in such circumstances.[5] Moreover, argues American, it only insured Nurse Broka, who never had any monetary demands directly asserted against him by the underlying claimants.[6]

Specifically, American notes that according to plaintiffs' complaint in this action, Nurse Broka negligently administered excess intravenous fluids to Mr. Hepworth, allegedly causing or contributing to Mr. Hepworth's death four days later. It is American's position, however, that plaintiffs have not alleged Nurse Broka was acting outside the course and scope of his duties in connection with those acts. Further, argues American, there were several other employees at the University who were potentially responsible for any excess administration of fluids or surrounding events.

The University opposes American's cross motion arguing the Governmental Immunity Act does not bar the University's claims for subrogation and equitable subrogation. Specifically, the University notes Utah Code Ann. §63-30-38 states that if a

---

[5]Indeed, asserts American, allowing the University or St. Paul to recover from Nurse Broka's insurer, when they are barred by statute from recovering from Nurse Broka, would abrogate the purpose of the Governmental Immunity Act.

[6]With respect to St. Paul, American contends it insured the University and all of its employees and the settlement was designed to cover every employee of the University who was involved in providing care to Mr. Hepworth. In sum, it is American's position St. Paul did no more than protect its own interests and those of its insureds by its participation in the Hepworth settlement.

governmental entity settles a claim against an employee, "the employee" may not be required to indemnify the entity. This section, argues the University, does not say that the employee's private insurer does not need to indemnify the entity. Similarly, asserts the University, Utah Code Ann. §63-30-33(1)(c) states that a governmental entity's "insurer" has no right of indemnification or contribution from the employee. While the legislature was careful to protect employees from indemnifying their employer, it is the University's position they did not draft a provision preventing the governmental employer from seeking indemnification from the employee's insurer. Additionally, with respect to the cases cited by American, the University notes that none address the situation where insurer was a self-insured governmental body.

Furthermore, argues the University, if American's interpretation of the Act were correct, the policy it provided to Nurse Broka would be worthless. Indeed, contends the University, American maintains that under the Act the University would be solely responsible for losses occasioned by its insured's negligence and that its policy would never be triggered because Nurse Broka supposedly would never be "legally obligated to pay" due to his employer's duty to indemnify him. According to the University, when American was initially invited to participate in the Hepworth settlement, they refused solely on the basis of the

"other insurance" exclusion in the policy. Consequently, argues the University, American waived any right to assert the Governmental Immunity Act as an excuse of its obligation to contribute.

Finally, the University contends it does not matter that Mrs. Hepworth did not demand the money directly from Nurse Broka. Specifically, the University notes that its subrogation claim is against American, not Nurse Broka, and American was on notice from the outset that a third party was pursuing a claim arising from its insured's negligence.[7]

St. Paul joins in the University's opposition and argues in addition that because both it and American insured Nurse Broka for the same risk, St. Paul is entitled to equitable contribution from American for its portion of the loss paid by St. Paul to the Hepworths. Indeed, notes St. Paul, its claim for equitable contribution (not subrogation) is not precluded by any argument that American stands in the shoes of Broka, because St. Paul is not required to stand in the shoes of the Hospital with respect to Broka's defense and, thus, becomes subject to the defense. The right of equitable contribution is not derivative and is not

---

[7]It is the University's position American's duty does not depend upon Nurse Broka's receipt of a demand for money. Indeed, notes the University, the policy defines "claim" as "receipt by you of a demand for money or services naming you and alleging a medical incident."

dependant upon any rights against indemnity the Broka may have under the Act.

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). "In considering a summary judgment motion, the Court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in the light most favorable to the party opposing summary judgment." Cinder v. A.L. Williams & Assocs., 739 P.2d 634, 634 (Utah Ct. App. 1987).

Applying the aforementioned to the facts of this case, it is important to note the University essentially concedes that the Hepworths made no "claim" within the meaning of the American policy against Nurse Broka. This is critical as the American's policy is only triggered by a "claim" or an insured's legal obligation to pay some amount. In other words, Nurse Broka never had any claims made against him and never became legally obligated to pay anything to the Hepworths in connection with the University's and St. Paul's settlement of the University's liability to the Hepworths. Accordingly, none of American's obligations under the policy it issued to Nurse Broka ever matured. Consequently, American is entitled to judgment as a matter of law.

With respect to St. Paul, there can be no claim for

contribution among insurers unless one insurer was equally obligated to provide coverage to the same insurer for the same risk, yet failed to do so. Here the obligations triggered by the Hepworths' demands were those of the University and its insurer, St. Paul, for amounts in excess of the University's retained limit. The Hepworth's made no demand that would have triggered the American policy.

Based upon the forgoing, American's Motion for Summary Judgment is granted. Consequently, the University's motion is, respectfully, denied.[8]

DATED this 7 day of October, 2002.

GLENN K. IWASAKI
DISTRICT COURT JUDGE

[8]In light of the forgoing ruling, the Court does not reach the issue of the Utah Governmental Immunity Act, nor the constitutional issues surrounding the Act.

CASE NO 980913150

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of OCTOBER, 2002, I mailed a true and correct copy of the foregoing order, postage prepaid thereon, to the following:

JARYL L. RENCHER
10 WEST 100 SOUTH #500
SALT LAKE CITY UT 84101

ALEC BARINHOLTZ
JENNIFER MATHIS
5 PARK PLAZA, SUITE 1200
IRVINE, CA 92614-8529

TERRY ROONEY
JULIANNE P BLANCH
PO BOX 45000
SALT LAKE CITY UT 84145-5000

BRET GARDNER
1121 EAST 3900 SOUTH BLDG C #200
SALT LAKE CITY UT 84124

DISTRICT COURT CLERK

BY: _____
DEPUTY CLERK

Thomas N. Crowther - 0773
CROWTHER & GARDNER, P.C.
Attorneys for Plaintiff
1121 East 3900 South, #C-200
Salt Lake City, Utah 84124
Telephone: (801) 262-0669
Telecopier: (801) 262-0797

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota Corporation. Plaintiff, vs. CONTINENTAL CASUALTY dba CNA INSURANCE COMPANIES, an Illinois Corporation, and Troy Alan Broka, Defendants.	**AMENDED COMPLAINT** Civil No.: 990908784 Judge: Glenn K. Iwasaki

For Claims against Defendants, Plaintiff alleges as follows:

PARTIES AND JURISDICTION

1. Plaintiff is a Minnesota Corporation Licensed and qualified to do business as an insurance company in the State of Utah.

2. Defendant Continental Casualty dba CNA Insurance Companies (hereinafter "CNA") is an Illinois corporation registered to do business, and doing business, as an insurance company in the State of Utah.

3. Defendant Troy Alan Broka (hereinafter "Broka") is an individual who caused injury in the state of Utah as hereinafter alleged and who is subject to jurisdiction of this court as a resident of the state of Utah, or, as a non resident, pursuant to Utah Code Ann. Section 78-27-24.

4. Venue and jurisdiction are proper pursuant to Utah Code Ann. Section 78-13-4, 7, Section 31A-1-105, and Section 78-3-4.

GENERAL ALLEGATIONS

5. Broka at all relevant times was employed by the University of Utah Hospital and the University of Utah (hereinafter collectively the "Hospital") as a travel nurse.

6. At all relevant times, CNA provided nursing professional liability insurance to Broka, issued through American Casualty Company, which was in effect at all times material to the claims herein asserted.

7. A copy of Broka's certificate for the aforementioned professional liability policy with CNA is attached hereto as Exhibit "A" and incorporated herein by this reference.

8. Broka's professional liability coverage provided limits of liability, in the event of a claim arising from the rendering of professional nursing services by Broka, in the amounts of $1,000.000 for each medical incident and $3,000,000 aggregate.

9. Broka's CNA policy provided professional liability coverage to him for, among other things, injury or damages caused by a medical incident arising out of care provided by Broka.

10. At all relevant times, Plaintiff provided the Hospital with excess liability insurance coverage above a $1,000,000 per occurrence self retention amount.

11. While working in the Hospital, Broka provided nursing care to Abel Hepworth, who was admitted on April 10, 1997 for surgical repair of an aneurysm in a cerebral artery.

12. In providing care to Mr. Hepworth, Broka negligently misread a physician's order for the infusion of IV fluids and infused Mr. Hepworth with an excessive amount of fluids at 500cc. per hour instead of the 100 cc. Per hour ordered by the physician.

13. As a result of a fluid overload suffered by Mr. Hepoworth from such incorrect administration of fluids, Mr. Heepworth died on April 14, 1997.

14. Shortly following the death of Mr. Hepworth, the Hospital was informed by his wife, Susan Hepworth, acting individually and on behalf of the Hepworths' minor children, Alex Hepworth and Ammon Hepworth (hereinafter collectively referred to as "the Hepworths"), that she intended to commence a lawsuit against the Hospital based on the care provided to her husband by Broka; specifically, the excessive administration of fluids.

15. Prior to commencing a lawsuit, Mrs. Hepworth initiated settlement negotiations with the Hospital.

16. On or about June 11, 1997, counsel for the Hospital informed CNA of the aforementioned facts involving Broka and invited CNA's participation in the settlement negotiations with Mrs. Hepworth.

17. By letter of July 17, 1997, CNA declined to participate in settlement negotiations.

18. On or about July 10, 1997, counsel for the Hospital tendered the defense and indemnification of Broka to CNA. CNA did not respond.

19. Because Broka was an agent of the Hospital and because his negligence caused Mr. Hepworth's death, the Hepworths' claims were subsequently settled by the Hospital and Plaintiff.

20. As a part of such settlement, the University paid the Hepworths $1,000,000, and Plaintiff paid them $323,523.

21. The settlement amounts paid to the Hepworths were paid as a result of and arising out of the negligent care rendered by Broka.

CLAIM ONE

(Subrogation - Breach of Duty to Defend-CNA)

22. Plaintiff realleges and incorporates herein by this reference the foregoing paragraphs 1 through 21 inclusive.

23. By CNA's failure to participate in the settlement and failure to defend Broka against the aforementioned claims, CNA breached the duty arising under its policy to defend Broka.

24. Because CNA breached its duty to defend Broka, the Hospital and Plaintiff paid such defense costs, and Plaintiff is therefore subrogated and entitled to recover defense costs incurred and paid by it, plus interest, from CNA.

25. Accordingly, Plaintiff is entitled to judgment against CNA for the costs and attorneys' fees of Plaintiff's participation in negotiating and defending the Hepworths' claims arising out of the care provided by Broka in an amount to be proven at trial, with interest thereon at the legal rate.

CLAIM TWO

(EQUITABLE SUBROGATION- CNA)

26. Plantiff realleges and incorporates herein by this reference the foregoing paragraphs 1 through 21 inclusive.

27. By CNA's failure to participate in the settlement and failure to defend Broka against the aforementioned claims, CNA failed to comply with its policy provisions requiring it to pay all amounts up to policy limits for which Broka became legally obligated to pay as a result of injuries caused by a medical incident arising from care provided by Broka.

28. Because CNA breached its duty to pay such amounts, Plaintiff is subrogated to and entitled to recover from CNA the $323,523 paid by Plaintiff to the Hepworths, plus interest thereon at the legal rate.

29. Accordingly, plaintiff is entitled to judgment against CNA in the amount of $323,523, with interest thereon at the legal rate.

CLAIM THREE

(CONTRIBUTION-CNA)

30. Plaintiff re-alleges and incorporates herein by this reference the foregoing paragraphs 1 through 21, inclusive.

31. CNA and Plaintiff both provided liability insurance coverage to Broka.

32. CNA's insurance provided first dollar coverage of $1,000,000 per occurrence, while Plaintiff's insurance provided coverage for liability only in excess of $1,000,000.

33. CNA had the primary obligation to pay the first $1,000,000 of the Hepworth settlement.

34. If CNA had paid the first $1,000,000 of the Hepworth settlement, there would have been no remaining liability for Plaintiff to pay after such payment by CNA and partial liquidation of and payment from the Hospital's retention amount.

35. By payment of a portion of the Hepworth settlement, Plaintiff has discharged $323,523 of an obligation that, under the circumstances of coverage provided by Plaintiff and by CNA, Plaintiff was not required to pay, and all of such payment was the obligation of CNA.

36. CNA is thus required to contribute to Plaintiff the entire $323,523 paid by Plaintiff, plus interest thereon at the legal rate.

CLAIM FOUR

(SUBROGATION - BROKA)

37. Plaintiff reassets and includes herein by reference the foregoing paragraphs 1 through 21 inclusive.

38. Pursuant to and in conformity with its insurance coverage of the Hopsital, Plaintiff has paid $323,523 to the Hepworths that was the obligation of Broka arising from his negligent and improper treatment of Abel Hepworth.

39. Having paid such amount and obligation on behalf of the Hospital, Plaintiff, through its arrangements with the Hospital, became subrogated to the Hospital's right to recover the amount

from Broka.

40. Accordingly, Plaintiff is entitled to judgment against Broka for $323,523 plus interest thereon at the legal rate.

WHEREFORE, Plaintiff requests judgment against Defendants as follows:

1. Against CNA under Claim One for reimbursement of Plaintiff's defense costs in an amount to be proven at trial, together with interest thereon at the legal rate;

2. Against CNA under Claim Two for $323,523, together with interest thereon at the legal rate;

3. Against CNA under Claim Three for $323,523, together with interest thereon at the legal rate;

4. Against Broka under Claim Four for $323,523, together with interest thereon at the legal rate; and

5. Against CNA and Broka for Plaintiff's costs herein incurred and such other relief, including attorneys' fees, as is just and appropriate or the right to which may be established at trial.

DATED this 18th day of August, 1999.

CROWTHER & GARDNER

By _____
Thomas N. Crowther
Attorneys for Plaintiff

Plaintiff's Address:
P.O. Box 5000
Brea, California 92822-5000

CERTIFICATE OF SERVICE

The foregoing Amended Complaint was served upon Defendant by mailing a copy thereof, postage pre-paid, to Henry E. Heath at Sixth Floor Boston Building, Nine Exchange Place, Salt Lake City, Utah, 84111, this 18th day of October, 1999.

CROWTHER & GARDNER, P.C.

by _____
Thomas N. Crowther